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SUPREME COURT, U.S.

No. 517

FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

SAVE WAY NORTHERN BLVD. INC.,

Appellant,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

STATEMENT AS TO JURISDICTION

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INDEX

PAGE

Statement as to Jurisdiction 1

Opinions Below 2

Jurisdiction 2

Questions Presented 3

The Ordinance Involved 4

Statement 5

(a) Appellant's Business—The Save Way Chain of Stations 5

(b) The Proceedings Below 5

(c) Manner, Method and Time of Raising the Federal Question Sought to Be Reviewed 6

The Questions Are Substantial 7

I—Most state courts have held similar statutes and ordinances unconstitutional 8

II—These ordinances bear no relationship to the public health, welfare and safety 10

APPENDIX A—Opinion of Magistrate James E. LoPiccolo 15

APPENDIX B—Memorandum Opinion of the Court of Special Sessions 16

APPENDIX C—Memorandum of the Court of Appeals .. 17

APPENDIX D—Order and Judgment of the Court of Appeals 19

PAGE

AUTHORITIES CITED:

Cases:

Breard v. Alexandria, 341 U.S. 622 (1951) 10

City of Lake Charles v. Hasha, 238 La. 635, 116 So. 2d 277 (1959) 8, 11

Dahnke-Walker Co. v. Bondurant, 257 U.S. 282 (1921) 3
De Veau v. Braisted, 363 U.S. 144 (1960) 3

Fried v. Kervick, 34 N.J. 68, 167 A.2d 380 (1961) 9

Gambone v. Commonwealth, 375 Pa. 547, 101 A.2d 634 (1954) 8, 11

Independent Warehouses, Inc. v. Scheele, 331 U.S. 70 (1947) 3

Levy v. City of Pontiac, 331 Mich. 100, 49 N.W.2d 80 (1951) 8, 12

Merit Oil Co. v. Director of Division on Necessaries of Life, 319 Mass. 301, 65 N.E.2d 529 (1946) 8
Moreson v. City of Akron, 20 Ohio Opinions 298 (Summit Co. C. P. 1941) 8

People v. Arlen Service Stations, Inc., 284 N.Y. 340 (1940) 6, 8, 10
People v. SAV-4-On-Gallon, Inc., 204 Misc. 708 (Magis. Ct., Queens Co. 1953) 12
People v. 25 Stations, Inc., 3 N.Y. 2d 488 (1957) 12

Regal Oil Co. v. State, 123 N.J.L. 456, 10 A.2d 495 (1939) 9

PAGE

Sears, Roebuck and Company v. City of New Orleans, 238 La. 935, 117 So.2d 64 (1960) 8
Serve Yourself Gasoline Stations Ass'n v. Brock, 39 Cal.2d 813, 249 P.2d 545 (1952), app. dism'd 345 U.S. 980 (1953) 8, 9
Smith v. California, 361 U.S. 147 (1959) 3
State v. Blackburn, 104 So.2d 19 (Fla. 1958) 8
State v. Guyette, 81 R.I. 281, 102 A.2d 446 (1954) 8, 10, 11
State v. Hobson, 46 Del. 381, 83 A.2d 846 (1951) 9
State v. Miller, 126 Conn. 373, 12 A.2d 192 (1940) 8
State v. Redman Petroleum Corp., 360 P.2d 842 (Nev. 1961) 8
State v. Union Oil Co. of Maine, 151 Me. 438, 120 A.2d 708 (1956) 8
State v. Woitha, 227 Iowa 1, 287 N.W. 99 (1939) 8
Sun Oil Co. v. Director of Division on Necessaries of Life, 163 N.E.2d 276 (Mass. 1960) 9

Town of Miami Springs v. Scoville, 81 So.2d 188 (Fla. 1955) 8, 11, 12
Treigle v. Acme Homestead Association, 297 U.S. 189 (1936) 10

Western Turf Association v. Greenberg, 204 U.S. 359 (1907) 3

Other Authorities:

United States Constitution:
14th Amendment, Section 1 3

Title 28, United States Code:
Section 1257 (2) 3
Section 2101 (c) 3

PAGE

Administrative Code of the City of New York:
Section B36-101.0, Local Law No. 141 of 1939 4
Section B36-103.0, Local Law No. 56 of 1941 ..... 3, 4

New York Herald Tribune of October 17, 1961 7

New York Times of October 17, 1961 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

SAVE WAY NORTHERN BLVD. INC.,

Appellant,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

STATEMENT AS TO JURISDICTION

Appellant appeals from the final order of the Court of Appeals of the State of New York (Appendix D annexed hereto) entered in this proceeding on June 9, 1961 affirming the order and judgment of the Court of Special Sessions of the City of New York, Appellate Part for the Second Judicial Department entered on March 10, 1961 which affirmed the judgment of the Magistrates Court of the City of New York convicting appellant of a violation of Section B 36-103.0 of the Administrative Code of the City of New York for displaying at its gasoline station signs bearing its trade and brand name, SAVE WAY upon a finding that this name refers to price and thereby violates the ordinance.

Appellant submits this Statement to show that this Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinions Below

The decision and sentence of the New York City Magistrate and the memorandum opinion of the Court of Special Sessions, Appellate Part, affirming the judgment of conviction are not reported. A copy of the former is attached hereto as Appendix A. A copy of the latter is attached hereto as Appendix B.

No opinion was rendered by the Court of Appeals in affirming the conviction except the memorandum appearing in 10 N.Y. 2d 727, a copy of which is annexed as Appendix C. As appears from said memorandum, Judge Stanley H. Fuld dissented upon the ground that

> ". . . the defendant's signs, bearing the trade name 'Save Way', do not state or refer directly or indirectly to price within the sense or meaning of the Administrative Code provisions upon which the prosecution and conviction are based." 10 N.Y. 2d 727 at page 728.

The memorandum opinion of the Court of Appeals granting appellant's application for an order amending that Court's remittitur so as to indicate that the constitutional issues presented herein were considered and passed upon in the State Court, is reported at 10 N.Y. 2d 748 and is set forth at page 7 *infra*.

Jurisdiction

The judgment of the Court of Appeals in this proceeding was entered on June 9, 1961. The notice of appeal was filed with the Clerk of the Court of Special Sessions of the City of New York (the court possessed of the record) on August 29, 1961. The jurisdiction of this Court on

this appeal is conferred by Title 28 United States Code Sections 1257 (2) and 2101 (c).

The following decisions, among others, are believed to sustain the jurisdiction of this Court to review the order and judgment herein on direct appeal: *De Veau* v. *Braisted*, 363 U.S. 144, 146 (1960); *Smith* v. *California*, 361 U.S. 147, 149 (1959); *Independent Warehouses, Inc.* v. *Scheele*, 331 U.S. 70, 79 (1947); *Dahnke-Walker Co.* v. *Bondurant*, 257 U.S. 282, 289 (1921); *Western Turf Association* v. *Greenberg*, 204 U.S. 359, 362 (1907).

Questions Presented

Whether Section B 36-103.0 of the Administrative Code of the City of New York as applied in this case violates the Due Process and Equal Protection clauses of the United States Constitution (14th Amendment, §1) in that:

(a) The ordinance, as applied below, making it a crime for appellant to place its trade and brand name SAVE WAY on appropriately placed signs, has no relationship to the prevention of fraud, the mischief the ordinance was designed to cure, and constitutes an unnecessary and oppressive restriction upon a lawful business, bearing no reasonable relation whatsoever to public peace, health, morals, welfare or safety.

(b) Statutory restrictions on the size and location of price signs at gasoline stations is, as found by a number of the state courts, arbitrary and oppressive, has no relation to any proper legislative objective, has the effect of reducing competition and discriminates against independent gasoline station dealers.

The Ordinance Involved

The provisions of Section B 36-103.0 of the Administrative Code of the City of New York here pertinent are as follows:

"B36-103.0 Placards to be posted.—a. It shall be unlawful for any person, firm or corporation to sell or offer for sale at retail for use in internal combustion engines in motor vehicles any gasoline unless such seller shall post and keep continuously posted on the individual pump or other dispensing device from which such gasoline is sold or offered for sale a sign or placard not less than seven inches in height and eight inches in width nor larger than twelve inches in height and twelve inches in width and stating clearly and legibly in numbers of uniform size the selling price or prices per gallon of such gasoline so sold or offered for sale from such pump or other dispensing device together with the name, trade name, brand, mark or symbol, and grade or quality classification, if any, of such gasoline.

"b. The amount of governmental tax to be collected in connection with the sale of such gasoline shall be stated on such sign or placard and separately and apart from such selling price or prices.

"c. No sign or placard stating or referring directly or indirectly to the price or prices of gasoline other than such signs or placards as hereinabove provided shall be posted or maintained on, at, near or about the premises on which gasoline is sold or offered for sale." *

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* Section B36-103.0 was enacted on July 15, 1941 as Local Law No. 56 of the City of New York. Its predecessor §B36-101.0, Local Law No. 141 of 1939, read in part:

"b. No sign or placard stating the price or prices of gasoline other than such signs or placards as hereinabove provided

Statement

(a) Appellant's Business—The Save Way Chain of Stations

Appellant operates a gasoline station in the County of Queens, City and State of New York. Since the opening of the station in June 1955, it has displayed on its premises large and attractive signs, costing over $13,000, bearing its trade and brand name Save Way (fols. 57, 88-89).

This is one of seventeen Save Way stations, an independent chain, selling Save Way gasoline purchased from an independent New Jersey refinery (fols. 87, 92, 116-117). They do not sell nationally advertised products of major oil companies.

These Save Way Service Stations are located in New York, Pennsylvania, New Jersey, Connecticut, Delaware and Maryland; four of them in New York State, two in New York City (fol. 88).

(b) The Proceedings Below

This proceeding, instigated by a nearby competitor* selling a nationally advertised brand of gasoline, culminated in appellant's conviction by a New York City Magistrate who imposed a $100 fine (fols. 25-26, 77-83). The Magistrate's determination was affirmed by order of the Court of Special Sessions, Appellate Part (fols. 199-204). The New York Court of Appeals likewise affirmed the conviction, Judge Fuld dissenting.

If this determination remains undisturbed, appellant will be unable to use its trade and brand name on the af-

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shall be posted or maintained on the premises on which said gasoline is sold or offered for sale."

* The summons herein was served following the institution of a mandamus action against the Mayor and other New York City officials (fols. 77-83).

fected station or others in New York City without facing repeated prosecutions and convictions.

(c) Manner, Method and Time of Raising the Federal Question Sought to Be Reviewed

The Federal questions sought to be reviewed on this appeal were raised by appellant at every stage of the proceedings and in each of the state courts below (e.g., fols. 7, 95-96).

Appellant repeatedly called attention to the many cases in other states in which similar statutes have been struck down as an arbitrary and unreasonable exercise of the police power, violative of both the State and Federal Constitutions. In its brief in the New York Court of Appeals appellant urged that a review of the decision in *People* v. *Arlen Service Stations, Inc.*, 284 N.Y. 340 (1940), which upheld the forerunner of the present ordinance, would be warranted

> "in light of the numerous recent cases in other jurisdictions holding similar ordinances unconstitutional."

In addition, appellant has maintained in each of the Courts below that even if the ordinance as written were constitutional, to include within its proscription the Save Way signs here in issue constitutes an unconstitutional deprivation of appellant's valuable property rights in its name and good will. The only possible justification for the ordinance and that specified in the *Arlen* case, is to protect the public from fraud in the sale of gasoline, a purpose that can hardly be served by preventing the use of appellant's trade and brand name.

By order dated July 7, 1961, the New York Court of Appeals granted an amendment of its remittitur by adding thereto the following:

"Upon the appeal herein there was presented, and necessarily passed upon, a question under the Constitution of the United States, viz.: whether Section B 36-103.0 of the Administrative Code of the City of New York as applied to appellant in this case effects a deprivation of due process and equal protection, in violation of the Fourteenth Amendment of the Constitution of the United States. The Court of Appeals held that appellant's constitutional rights were not violated."

The Questions Are Substantial

The validity and scope of the ordinance involved in this proceeding, and of similar ordinances and statutes, is a matter of serious concern not only to appellant, and the SAVE WAY chain of service stations but to all independent gasoline station dealers who cannot rely on the selling power of nationally advertised brands as do their competitors. These dealers are particularly dependent upon the use of appropriately placed signs, including price signs, as their principal means of communicating with the purchasing public.

Independent dealers have time and again urged, as does the appellant here, that restrictions as to the size and placement of price signs are arbitrary and oppressive, serving no public interest, but rather the monopolistic interests of the large gasoline companies. An investigation of wholesale gasoline prices in the New York Metropolitan Area was recently undertaken by the Antitrust Division of the Department of Justice.*

* Articles concerning this investigation appeared in the NEW YORK HERALD TRIBUNE and the NEW YORK TIMES of October 17, 1961. The investigation interestingly enough deals with the differences in both wholesale and retail prices of gasoline in New York City—which makes it a crime to refer to price on gasoline station signs—and Nassau County which has no such statute.

I

Most state courts have held similar statutes and ordinances unconstitutional.

The question of the constitutionality of statutes and ordinances prohibiting the display of gasoline price signs except those of limited size on pumps—invisible from the roadway—has been the subject of much litigation in the state courts. While such legislation has been held invalid on both federal and state constitutional grounds in a clear majority of cases, the results have by no means been uniform.

Constitutional infirmities were found by nine states—Connecticut, Florida, Louisiana, Maine, Michigan, Nevada, Ohio, Pennsylvania and Rhode Island.* In each instance a violation of the due process clause of the United States Constitution was urged and expressly or by implication held to be present.

Similar statutes and ordinances have been upheld in three states—Iowa, Massachusetts and New York.** How-

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* *State* v. *Miller*, 126 Conn. 373, 12 A.2d 192 (1940); *Town of Miami Springs* v. *Scoville*, 81 So.2d 188 (Fla. 1955); *State* v. *Blackburn*, 104 So.2d 19 (Fla. 1958); *City of Lake Charles* v. *Hasha*, 238 La. 635, 116 So.2d 277 (1959); *Sears, Roebuck and Company* v. *City of New Orleans*, 238 La. 935, 117 So.2d 64 (1960); *State* v. *Union Oil Co. of Maine*, 151 Me. 438, 120 A.2d 708 (1956); *Levy* v. *City of Pontiac*, 331 Mich. 100, 49 N.W.2d 80 (1951); *State* v. *Redman Petroleum Corp.*, 360 P.2d 842 (Nev. 1961); *Moreson* v. *City of Akron*, 20 Ohio Opinions 298 (Summit Co. C. P. 1941); *Gambone* v. *Commonwealth*, 375 Pa. 547, 101 A.2d 634 (1954); *State* v. *Guyette*, 81 R.I. 281, 102 A.2d 446 (1954).

** *State* v. *Woitha*, 227 Iowa 1, 287 N.W. 99 (1939); *Merit Oil Co.* v. *Director of Division on Necessaries of Life*, 319 Mass. 301, 65 N.E.2d 529 (1946); *People* v. *Arlen Service Stations, Inc.*, 284 N.Y. 340 (1940). A case erroneously cited by respondent below as supporting its position is *Serve Yourself Gasoline Stations Ass'n* v. *Brock*, 39 Cal.2d 813, 249 P.2d 545 (1952), appeal dismissed 345 U.S. 980 (1953). The statute there involved contains

ever, in the recent case of *Sun Oil Co.* v. *Director of Division on Necessaries of Life*, 163 N.E. 2d 276 (Mass. 1960), the Supreme Judicial Court of Massachusetts held that its statute did not prevent the use of words which promised thrift in the purchase of gasoline through the use of the words "thrift", "thrifty", and "thriftier".

In one state—Delaware—a limitation on the size of price signs was struck down as violative of the Fourteenth Amendment though the restriction of such signs to pumps was upheld.* A similar New Jersey statute was originally held to be unconstitutional.** However, dictum in a recent decision by the New Jersey Supreme Court now places the New Jersey position in doubt.†

The impact of conflicting state determinations upon the business of independent gasoline station chains having service stations in several states, is illustrated by the dilemma in which the SAVE WAY chain now finds itself. In Pennsylvania and Connecticut SAVE WAY dealers can freely display their trade and brand name on signs. A similar display in New York City has resulted in criminal prosecution. In New Jersey the issue is in doubt and in Delaware SAVE WAY dealers may some day have to place all of their signs, large and small alike, on pumps.

Only a determination by this Court can resolve the conflict between the states as to the constitutionality of these statutes and ordinances.

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restrictions against the use of the word "save" unless the actual price of gasoline is indicated in numbers of equal size. The California Supreme Court in the *Brock* case upheld the constitutionality of its statute expressly distinguishing it from those similar to the ordinance here at issue where " . . . the right to maintain signs of a sufficient size to be read by a passing motorist was prohibited."

* *State* v. *Hobson*, 46 Del. 381, 83 A.2d 846 (1951).

** *Regal Oil Co.* v. *State*, 123 N.J.L. 456, 10 A.2d 495 (1939).

† *Fried* v. *Kervick*, 34 N.J. 68, 167 A.2d 380 (1961).

II

These ordinances bear no relationship to the public health, welfare and safety.

While this Court has expressed its reluctance to use the due process clause of the Fourteenth Amendment to strike down state regulatory laws "where there are reasonable bases for legislative action" * and has held that private rights "must yield to a proper exercise of the police power";** the Court has also emphasized that the police power "must be exercised for an end which is in fact public and the means adopted must be reasonably adapted to the accomplishment of that end and must not be arbitrary or oppressive." †

The ordinance here at issue serves no public purpose; it is arbitrary and oppressive; and even if there were justification for the restrictions on "price" signs, the ordinance, as interpreted and applied below, is clearly arbitrary.

The New York Court of Appeals has upheld the ordinance as "designed to prevent fraud in the retail sale of gasoline." †† However, as the Supreme Court of Rhode Island observed in *State* v. *Guyette*, 81 R.I. 281, 102 A. 2d 446 (1954):

> "If the statute generally is to be supported on the theory that the public is entitled to be protected against fraud by requiring comparatively small signs on the pump to display the actual amount of the price of the fuel separately and apart from the tax, it is difficult

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* *Breard* v. *Alexandria*, 341 U.S. 622, 633 (1951).

** *Treigle* v. *Acme Homestead Association*, 297 U.S. 189, 197 (1936).

† *Ibid.*

†† *People* v. *Arlen Service Stations, Inc.*, 284 N.Y. 340, 343 (1940).

to see why a similar and larger sign elsewhere on the premises would not be at least as helpful in achieving the purpose of the statute" (81 R.I. at page 284, 102 A. 2d at page 450).

Again in *Gambone* v. *Commonwealth*, 375 Pa. 547, 101 A. 2d 634 (1954), the Supreme Court of Pennsylvania stated:

"Defendants state that the object is to prevent fraud and deception, it being claimed that some dealers endeavor to attract passing motorists by misleading advertisements calculated to make them believe that the gasoline was being sold at a lower price than was actually the case. It is quite impossible, however, to see how the size of the sign would have any relevancy to the perpetration of such fraud; on the contrary, it would seem that the larger the sign the more difficult it would be for the dealer to deceive the purchaser" (375 Pa. at page 552, 101 A. 2d at page 637).

In *City of Lake Charles* v. *Hasha*, 238 La. 635, 116 So. 2d 277 (1959), the Supreme Court of Louisiana struck down an ordinance similar to that here at issue, stating:

"Obviously, on its face it is designed to restrict competition and foster monopolistic practices, and is not a legitimate exercise of the police power" (238 La. at page 646, 116 So. 2d at page 280).

Again in *Town of Miami Springs* v. *Scoville*, 81 So. 2d 188 (Fla. 1955), the Supreme Court of Florida adopted the following language from the opinion of the lower court:

". . . the definite weight of authority, and the modern thought on the question, holds that the legislative re-

strictions of the kind involved here, particularly where it injures a party on a competitive basis, represent unconstitutional restraints on use and enjoyment of one's business and property, and a taking of property without due process of law, in violation of State and Federal constitutional guarantees" (81 So. 2d at page 193).

In the terse language of the Supreme Court of Michigan "The ordinance bears no reasonable relation whatsoever to public peace, health, morals, welfare or safety." *

In most of the cases discussed above the issue involved was whether independent dealers whose prices were lower than those of dealers selling nationally advertised brands had the right to maintain appropriately placed "price" signs of a sufficient size to be read by passing motorists. The decision here striking down appellant's right to employ its trade and brand name which neither directly nor indirectly states a "price," ** raises an entirely new area of governmental control potentially more crippling to independent dealers than anything which has come before. Henceforth, not only the display of "price" signs but also of legitimate trade and brand names, embodying substantial good will, will be subject to restriction simply because they contain such words as "save," "thrift" or "economy." †

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* *Levy* v. *City of Pontiac*, 331 Mich. 100, 49 N.W.2d 80, 83 (1951).

** For examples of indirect reference to price see *People* v. *25 Stations, Inc.*, 3 N.Y. 2d 488 (1957) where the number "25" indicated price and *People* v. *SAV-4-On-Gallon, Inc.*, 204 Misc. 708 (Magistrate's Court, Queens Co. 1953) where the price charged was 4¢ less than the prevailing per gallon price.

† Under the decision below, Economy Stores would be prohibited from using its name in connection with a gasoline station. Similarly, the well known department store Macy's could not use its slogan "It's smart to be thrifty" in connection with a gasoline station operation.

The ordinance as interpreted below—crippling as it does appellant's competitive position by making it a crime for appellant to use its trade name, employed without hindrance over the years to build good will—is arbitrary and oppressive having no relationship to any proper objective of the police power. Nor does the impairment of appellant's business serve any public purpose although it may serve the private interests of those who seek to use their size and power to destroy effective competition.

We believe the holding below constitutes an unconstitutional deprivation of appellant's rights without due process of law, that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

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APPENDIX A

Opinion of Magistrate James E. LoPiccolo delivered in open court on April 28, 1960:

The decision is this—incidentally, I tell you, gentlemen, I wrote this some days ago. I thanked the attorneys for the respective parties for their briefs which were received and helped the Court in arriving at the decision. This Court relies on the strong presumption of the constitutionality of the statute involved, in this case. It does not seriously concern itself with the issue, that issue particularly, as the law does not appear to be unreasonable or arbitrary. Defendant's contention that the alleged valuable good will would be destroyed by the People if the People were successful in the prosecution and therefore would be entitled to immunity from the statute does not impress this Court. The defendant's use of the word or the name "Save Way" and operated as such for a period of years without any apparent resistance or disapproval of the authority has no merit in the determination of this Court as it finds that the law has been in fact violated. From the testimony adduced at the trial, it is the Court's considered opinion that the defendant's use of "Save Way" does in fact leave the average person to the conclusion that "Save Way" refers to the price of gasoline which is offered for sale and therefore finds the defendant guilty (fols. 183-186).

APPENDIX B

Memorandum opinion of the Court of Special Sessions, Appellate Part, rendered on March 10, 1961:

MEMORANDUM

In this appeal from a conviction of the defendant corporation of a violation of Sec. B36-103.0 of the Administrative Code of the City of New York, both sides concede that the statute is constitutional. The only question is whether the signs in question violate the statute.

We are of the opinion that the case of *People* v. *25 Stations Inc.*, 3 N. Y. 2nd 488 is controlling in this case and the magistrate could find from the photographic exhibits and the evidence that the sign constituted a violation of the Administrative Code (fols. 203-204).

APPENDIX C

Memorandum of the Court of Appeals.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, v. SAVE WAY NORTHERN BLVD., INC., APPELLANT

Argued May 17, 1961; decided June 9, 1961.

APPEAL, by permission of an Associate Judge of the Court of Appeals, from a judgment of the Court of Special Sessions of the City of New York, Appellate Part, in the Second Judicial Department, entered March 10, 1961, affirming a judgment of the City Magistrates' Court of the City of New York, Borough of Queens (JAMES E. LOPICCOLO, M.), convicting defendant of a violation of section B36-103.0 of the Administrative Code of the City of New York. The complaint charged that defendant violated that section of the Administrative Code on February 2, 1960 in that defendant, at its gasoline service station at 39-04 Northern Boulevard in the Borough of Queens, displayed a sign more than 12 inches high and 12 inches wide with the legend "SAVE WAY" thereon, thereby referring directly or indirectly to the price of gasoline sold. Section B36-103.0 of the Administrative Code provided that it should be unlawful to sell gasoline unless the seller posted on the pump a sign not more than 12 inches high nor 12 inches wide stating the selling price per gallon, and that (subd. c) "No sign or placard stating or referring directly or indirectly to the price or prices of gasoline other than such signs or placards * * * shall be posted or maintained on, at, near or about the premises on which said gasoline is sold or offered for sale." Defendant's sign displayed the word "SAVE" printed in large letters in a horizontal position and the word "WAY" printed in a vertical position. Defen-

dant's full corporate name was not used. In the Court of Appeals defendant argued that the use of its trade name "SAVE WAY" did not refer directly or indirectly to price and that to apply the ordinance to prevent defendant from using its legitimate trade and brand name violated the due process and equal protection clauses of the Federal and State Constitutions.

Harold H. Levin and *Larry M. Lavinsky* for appellant.

Leo A. Larkin, Corporation Counsel (Beatrice Shainswit and *Seymour B. Quel* of counsel), for respondent.

Judgment affirmed upon the authority of *People* v. *25 Stations* (3 N Y 2d 488). No opinion.

Concur: Chief Judge DESMOND and Judges DYE, FROESSEL, VAN VOORHIS, BURKE and FOSTER. Judge FULD dissents and votes to reverse and to dismiss the complaint upon the ground that the defendant's signs, bearing the trade name "SAVE WAY", do not state or refer directly or indirectly to price within the sense or meaning of the Administrative Code provisions upon which the prosecution and conviction are based.

APPENDIX D

Order and Judgment of the Court of Appeals of the State of New York in The People of the State of New York v. Save Way Northern Blvd., Inc.

No. 156

THE PEOPLE, &c.,

Respondent,

vs.,

SAVE WAY NORTHERN BLVD., INC.,

Appellant.

BE IT REMEMBERED, that on the 27th day of April, in the year of our Lord one Thousand nine hundred and sixty one, Save Way Northern Blvd., Inc., the appellant in this cause came here unto the Court of Appeals by Proskauer Rose Goetz & Mendelsohn, its attorneys, and filed in said Court a Notice of Appeal and return thereto from the judgment of the Court of Special Sessions of the City of New York. And the People, &c., the respondent in said cause, afterwards appeared in said Court of Appeals by Charles H. Tenney, Corporation Counsel of the City of New York.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, the said Court of Appeals having heard this cause argued by Mr. Harold H. Levin, of counsel for the appellant, and by Beatrice Shainswit, of counsel for the respondent, and after due deliberation had thereon, did

order and adjudge that the judgment appealed from herein be and the same hereby is affirmed upon the authority of *People* v. *25 Stations,* 3 N Y 2d 488. And thereafter a motion to amend the remittitur having been granted this remittitur is hereby amended by adding thereto the following: Upon the appeal herein there was presented, and necessarily passed upon a question under the Constitution of the United States, viz.: Whether Section B 36-103.0 of the Administrative Code of the City of New York as applied to appellant in this case effects a deprivation of due process and equal protection, in violation of the Fourteenth Amendment of the Constitution of the United States. The Court of Appeals held that appellant's constitutional rights were not violated.

And it was also further ordered, that the record aforesaid and the proceedings in this Court be remitted to the Court of Special Sessions of the City of New York, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be affirmed, &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Court of Special Sessions of the City of New York, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Court of Special Sessions before the Justices thereof, &c.

(S) Raymond J. Cannon
Clerk of the Court of Appeals
of the State of New York

Appendix D

Court of Appeals, Clerk's Office)
:
Albany, June 9, 1961.)

I hereby certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

(S) RAYMOND J. CANNON
Clerk

(36610) No. 517

LIBRARY
SUPREME COURT, U. S

IN THE

Supreme Court of the United States

October Term, 1961

SAVE WAY NORTHERN BLVD. INC.,
Appellant,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Appellee.

MOTION TO DISMISS

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INDEX

	PAGE
MOTION TO DISMISS	1
THE LACK OF FEDERAL SUBSTANCE IN THE ISSUES PRESENTED BY APPELLANT	1
THE ORDINANCE INVOLVED	5
The Purpose of the Ordinance	5
The Original Enactment	6
The 1941 Amendment	7
COUNTER-STATEMENT OF QUESTION PRESENTED	8
ARGUMENT	9
Since the New York City ordinance patently constitutes a reasonable exercise of police power, the challenge thereto presents no substantial federal question	9
CONCLUSION	18

CITATIONS

Cases:

Breard v. Alexandria, 341 U. S. 622 (1951)	9
Fried v. Kervick, 34 N. J. 68, 167 A. 2d 380 (1961)	12
Gant v. Oklahoma City, 289 U. S. 98 (1933)	17
Hauge v. Chicago, 299 U. S. 387 (1937)	17

PAGE

Levy v. City of Pontiac, 331 Mich. 100, 49 N. W. 2d 80 (1951) 17

Nebbia v. People of State of New York, 291 U. S. 502 (1934) 13

People v. Arlen Service Stations, 284 N. Y. 340 (1940) 9
People v. Sav-4-On-Gallon, 204 Misc. 708 (Mag. Ct. Queens Co., 1953) 8
People v. 25 Stations, Inc., 3 NY 2d 488 (1957) 8

Semler v. Dental Examiners, 294 U. S. 608 (1935) 12
Serve Yourself Gasoline Stations Ass'n v. Brock, 39 Cal. 2d 813, 249 P. 2d 545 (1952), app. dism. 345 U. S. 980 (1953) 14
South Carolina Highway Dept. v. Barnwell Bros., 303 U. S. 177 (1938) 17
State v. Hobson, 46 Del. 381, 83 A. 2d 846 (1951) 13
Sun Oil Co. v. Director of Division on Necessaries of Life, 163 N. E. 2d 276 (Mass. 1960) 13

United States v. Carolene Products Co., 304 U. S. 144 (1938) 16

Other Authorities:

United States Supreme Court, Revised Rules, Rule 16 1

Administrative Code of the City of New York:
Section B 36-101.0, Local Law No. 141 of 1939 6
Section B 36-103.0, Local Law No. 56 of 1941 1, 5, 7

Proceedings of New York City Council:
1938: vol. 1, pp. 1351-3 6
vol. 2, pp. 54-167 6
1939: vol. 1, pp. 27, 84, 252, 745, 1696 6
vol. 2, pp. 9-10 6
1941: vol. 1, p. 1165 7

6 McQuillin, Municipal Corporations (3d ed.), Sec. 20.05, p. 12 15

IN THE

Supreme Court of the United States

October Term, 1961

SAVE WAY NORTHERN BLVD. INC.,

Appellant,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

MOTION TO DISMISS

The People of the State of New York, pursuant to Rule 16 of the Revised Rules of this Court, move to dismiss this appeal from the final order of the New York Court of Appeals affirming defendant's conviction of violating Section B36-103.0 of the New York City Administrative Code, on the ground that no substantial federal question of any kind has been raised.

Reported below: 10 NY 2d 727, 176 N. E. 2d 839.

The Lack of Federal Substance in the Issues Presented by Appellant

The ordinance at bar, as amended in 1941, regulates the nature and location of the gasoline price signs that New York City gas stations may post, and bars all nonconforming signs "referring directly or indirectly to the

price" of gasoline. New York's highest court affirmed the finding of the two courts below that appellant's signs—far exceeding the statutory limitations, and bearing the words "Save Way", with the "Save" placed horizontally and superimposed above the vertical "Way" underneath—referred indirectly to the price of gas, and thus were in violation of the ordinance.

(a) Despite the fact that three courts have now resolved this factual question against appellant, the latter still seeks to generate here an issue as to whether its signs refer to price.

The courts below found, however—and indeed appellant conceded—that the name "Save Way" was deliberately and artificially coined in 1951; has no basis in any special method of selling or producing the gasoline; is not the name of the refinery that supplies the gasoline, the parent corporation of the chain, the gasoline bought by the chain, or the company that barges or delivers the gasoline; and is not a registered trade name or trade mark (Court of Appeals Record, 117-134).

The courts accordingly concluded that the name "Save Way", and the lurid signs artfully arranging the name to emphasize the "Save", could have no other purpose but to attract the passing motorist with the exhortation that in this station he would find a way to save—i.e., lower prices. Since the ordinance was enacted precisely to end competition via price posters—the New York City legislative body having found that such poster competition among gasoline stations created an inexorable temptation to fraud and deception, and having then amended the statute

specially to bar indirect as well as direct references to price, because of just such circumventions as appellant's—the conviction of violation was upheld, without opinion, by New York's highest court.

(b) In view of this incontestable finding of violation, appellant here has been forced to resort primarily to a broadside attack on the constitutionality, not merely of New York City's ordinance, but of all the scores of "statutory restrictions on the size and location of price signs at gasoline stations" throughout the country (Appellant's Statement, p. 3).

In other words, having been defeated in its attempt to outwit and evade New York's restrictions, appellant now seeks to destroy them. It is undeterred by the fact that New York's statute was held constitutional by the New York Court of Appeals a full 21 years ago. Nor does it evince concern that, in passing on appellant's device to evade that statute, neither the convicting Magistrate, the three-man intermediate court, nor a single one of the seven judges of the Court of Appeals indicated a shadow of a doubt as to the validity of the ordinance; or that the single dissenting Judge in the Court of Appeals made plain that he differed solely on the factual question of whether appellant's signs referred to price, and that he did not question for a moment the conclusion of his colleagues that the ordinance was wholly constitutional.

We will establish that the ordinance—in view of the obvious evil being met and the reasonableness of the means adopted by the legislature to deal with that evil—was patently constitutional, within all the long-settled tests

thereof. Certainly, when together with this there is considered the untroubled enforcement of this ordinance for 22 years, and the unanimous rulings of the three courts below, the utter insubstantiality of any federal issue here becomes, we believe, most evident.

(c) Nor has appellant introduced any true new question with its secondary claim that its particular circumvention of the ordinance—the clever embodiment of the reference to price in its specially created trade name—somehow gives it property rights walled in against all State regulation. No one compelled appellant, years after New York enacted this statute, to choose a name in deliberate violation thereof [1]; having done so, and been caught, appellant is hardly in a position to demand this Court's aid. The only significance in the fact that "Save Way" was a trade name is that appellant chose that form for its scheme to circumvent the ordinance. That scheme has been blocked; appellant cannot now fall back on it to claim special "property rights" in its "tradename" which other, less astute, violators lack.

---

(1) The ordinance was enacted in 1939; the name "Save Way" was first created by appellant's parent company in 1950, as the name under which the chain of 17 gas stations would thereafter sell its gasoline (Record, 122-3); appellant corporation was organized in 1955 to operate the chain's first New York City station (Record, 88) (the only other New York City station was established in 1959, after the chain was on notice of the challenge to its signs—Record, 89). Thus the name was not used in New York City until the ordinance had been on the books for 16 years.

The Ordinance Involved

The Purpose of the Ordinance

Section B36-103.0 of the Administrative Code of the City of New York is printed at page 4 of appellant's Statement as to Jurisdiction. We need not ourselves describe the evil which the legislature sought to combat in enacting it; appellant has done that for us very well, in its reply brief herein in the New York Court of Special Sessions, where it said (pp. 7-9):

> "The Court will take judicial notice of the fact that prior to the enactment of the ordinance involved, gasoline stations in New York and elsewhere were in the habit of posting large signs indicating the price at which gasoline was being sold in order to entice—very often misleadingly—the passing motorist.
>
> A common practice still in vogue in Nassau and other counties is to display signs having large figures to which is added '.9' in tiny figures so as to suggest that the price of the gasoline is, for example, 27¢, whereas, in fact it is 27.9¢.
>
> Another device employed by the unscrupulous gasoline station owner is to have a large sign containing, let us say, the figures 24¢. When the motorist drives into the station, he discovers that instead of gasoline being sold at 3¢ below the prevailing price (27¢) in the area, the 24¢ refers to a quart of oil while gasoline would be 29¢ or 30¢ a gallon. It is this sort of practice that the ordinance was designed to eliminate.
>
> We subscribe to the City's language in describing the purposes of the ordinance as stated early in its brief. * * * It was, says the City,

"• • • designed to eliminate various deceptive practices which had arisen in the retail gasoline industry. In particular, it imposed severe limitations on the placards posted at a gas station to advertise prices. A primary motivation for the measure appears to have been community outrage over bold and huge signs, widely used by dealers at the time, which enticed passing motorists by giving confusing or even false impressions as to the price charged for gasoline, particularly through claims of savings and discounts. By prohibiting all but small, informative price notices, the Legislature sought to eliminate the temptation to fraud and deception endemic in competition via price posters.' "

The Original Enactment

The provisions quoted by appellant constitute only a portion of the comprehensive legislation originally enacted in 1939 by New York City in regard to these service station vending practices. The bill was sponsored by the City Department of Markets. It was a product of the most careful deliberation for well over a year; a public hearing was held; continual revisions were made, with repeated Reports to the City Council by the committee in charge of the bill; the fullest consideration was had, both on the original draft and on the final bill as amended to cover all objections. The ultimate enactment, L. L. 141 of 1939 (N. Y. C. Admin. Code, Sec. B36-101.0), was designed to require "• • • the posting of retail prices to prohibit misbranding and adulteration and for other purposes on gasoline and motor oils." (See Proceedings of New York City Council, 1938—v.1, pp. 1351-3, v. 2, pp. 54-167; 1939—v.1, .7, 84, 252, 745, 1696, v.2, pp. 9-10).

To carry out this design, *inter alia*, the sale of gasoline was permitted only if a sign was posted, directly on the pump, stating clearly and legibly and in figures of uniform size the price, brand, and grade. Such signs were required to be large enough to be read without the slightest difficulty —at least 7 inches high by 8 inches wide—but not so large that dealers would be tempted to seek to attract passing motorists with cleverly printed deceptions—i.e., no more than 12 inches high by 12 inches wide. Finally—and obviously—all other price signs were barred.

The 1941 Amendment

Two years later, when experience with the law had demonstrated the various artful guises evasion of the legislative policy could take, the ordinance was again amended, after additional legislative hearings, to its present language [L. L. 56 of 1941—N. Y. C. Admin. Code, Sec. B36-103.0]. *Inter alia*, the original language barring nonconforming signs "stating the price" of gasoline was changed to bar all signs "stating or referring directly or indirectly" to that price. In this connection, the Committee on General Welfare of the City Council, on whose recommendation the amendment was enacted, reported on June 17, 1941 (New York City Council Proceedings, v. 1, p. 1165):

> "That the original law enacted to correct certain evils in this business met with general public approval. Unfortunately, however, unscrupulous dealers thereafter adopted devious means to circumvent the provisions. This bill will further protect and clarify the situation, and we recommend its enactment into law."

It was this amended language—designed precisely to strengthen the statute by ending devious circumventions of its objectives—that appellant's sign was found to violate. It was not the only such attempt at evasion; typical of a number of others struck down by the New York courts, all evidencing that the danger feared by the City Council was entirely real, was *People* v. *25 Stations, Inc.*, 3 NY 2d 488 (1957), where a chain of gas dealers incorporated themselves as "25 Stations, Inc.," and then posted outsize signs "Owned and Operated by 25 Stations, Inc." with the "25" in much bigger print than the other words; their gasoline was sold at 24.9¢ a gallon. There, as with "Save Way", the courts saw through the attempt to circumvent the ordinance, and upheld the finding that an indirect reference to price was patently involved. See also *People* v. *Sav-4-On-Gallon, Inc.*, 204 Misc. 708 (Mag. Ct. Queens Co., 1953).

In this setting and on this record, we submit what we conceive to be the true issue before this Court.

Counter-Statement of Question Presented

Where a State has found that appellant deliberately conceived its trade name to have it serve as an exhortation concerning price and that this artifice flouts the legislative objective of frustrating fraud on the consumers, is the State powerless to vindicate its policy and to prosecute a cunning violator because the violator asserts that his artifice is enshrined as a brand name and is protected as a property right against any legislative regulation, and is this tenuous assertion of such substantiality as to warrant review by this Court?

ARGUMENT

Since the New York City ordinance patently constitutes a reasonable exercise of police power, the challenge thereto presents no substantial federal question.

(a) That a municipality may regulate marketing and advertising practices in the public interest—even where this involves prohibiting exercise of a legitimate occupation, let alone restricting merely the type of advertisement which may be used—is of course, as appellant concedes (Statement, p. 10), well-settled. *Breard v. Alexandria*, 341 U. S. 622, 632-3 (1951) (upholding local ordinance prohibiting all door-to-door soliciting without each individual homeowner's consent).

Nor does it matter that appellant's particular infringements of local law have no fraudulent intent or consequence. In this connection we can do no better here than quote the extensive constitutional discussion by the New York Court of Appeals when it upheld this very ordinance 21 years ago [*People* v. *Arlen Service Stations*, 284 N. Y. 340, 343-4 (1940)]:

> "Section B36-101.0 of the Administrative Code * * * bears upon its face clear indication that it was designed to prevent fraud in the retail sale of gasoline. In our present inquiry, however, we may not give weight to the fact that fraud was neither charged nor proved against the defendant. A business, however honest in itself, may be the subject of governmental regulation if it may become a medium of fraud. 'It is not enough to say that the business may be honestly conducted.' (*People* v. *Beakes Dairy Co.*, 222

N. Y. 416, 427.) Nor may we extend the field of our judicial inquiry into the realm of expediency where legislative judgment alone dictates the necessity for statutory regulation and its wisdom.

The defendant asserts that the law here in question is an improper exercise of police power and violates the due process clauses of the Federal Constitution (Fourteenth Amendment) and the Constitution of New York, Art. I, §6). But we know that 'A reasonable regulation governing the use of property offered for sale so as to prevent fraud, does not destroy that property nor deprive the owner of its use in a constitutional sense.' (*People* v. *Luhrs*, 195 N. Y. 377, 383.) We also have in mind the rule that 'A legitimate public purpose may always be served without regard to the constitutional limitations of due process and equal protection.' (*People* v. *Perretta*, 253 N. Y. 305, 309; *People ex rel. Durham Realty Corp.* v. *La Fetra*, 230 N. Y. 429; *New York ex rel. Bryant* v. *Zimmerman*, 278 U. S. 63.)"

The tests of constitutionality, as the Court of Appeals pointed out, are (pp. 344-5):

"From the arguments of counsel we understand that, as in a case before this court more than fifty years ago, which involved the adulteration of food products, so today when we consider a local regulatory measure which governs the retail sale of gasoline, 'Ingenuity keeps pace with greed, and the careless and heedless consumers are exposed to increasing perils.' (*People* v. *Kibler*, 106 N. Y. 321, 324.) Those perils, including the exceptional facilities which the retail sale of gasoline affords for imposition upon the public, are not, however, a matter for our consideration. We may assume they were the subject of investigation and study by the City Council during its consideration of

the necessity for and wisdom of the local law in question. Our inquiry goes only to the reasonableness of the resulting enactment.

It cannot be said of this local legislation that it impairs the defendant's freedom to determine the price at which it will sell the gasoline which it offers to the public, nor does it prohibit the defendant from advertising that price. True, there are restrictions as to the location and size of the sign which the City Council has determined must be posted upon each pump as a means of imparting to customers information upon factors which enter into each retail sale of motor fuel —the sale price per gallon of the gasoline to be delivered at each pump; the amount of governmental tax to be collected in connection with the sale; the trade name, if any, by which the gasoline is marketed and the grade or quality by which it is classified. Likewise a restriction is made effective by the prohibition against the posting upon the premises of any other sign which states the price or prices of gasoline sold."

None of these restrictions in any way, the Court held, deprived appellant of its property without due process, for (p. 345):

"Restriction is implicit in police power however exercised. The problem is to ascertain whether the restriction, as an incident to the accomplishment of the legislative purpose, is reasonable in degree. We have said that 'Any trade, calling or occupation may be reasonably regulated if "the general nature of the business is such that unless regulated many persons may be exposed to misfortunes against which the Legislature can properly protect them."' (*Biddles, Inc.* v. *Enright*, 239 N. Y. 354, 363.) In the present instance we do not regard the restriction as to the placement, size or limitation of signs, or the require-

ment of a uniformity in size of the retail sale price figures thereupon, as being more drastic than is reasonable to accomplish the end for which the law was adopted."

[See also *Semler* v. *Dental Examiners*, 294 U. S. 608, 612-613 (1935), reviewing and upholding the public policy considerations which support legislation aimed at price references in connection with the furnishing of particular services—or, as in our case, the furnishing of gasoline.]

(b) Appellant's citation of decisions in other jurisdictions is not only beside the point but actually self-defeating. The very existence of these other statutes underscores the widespread character of the problem to which the New York City Council had addressed itself. Secondly, these foreign cases involve innumerable substantive differences in factual patterns, statutory drafting, and the state constitutions themselves; the resulting judicial attitudes naturally vary just as widely. The validity of New York City's particular approach—and whether this challenge thereto presents any substantial federal question—patently cannot be affected by any of those rulings.

Appellant's attempt to make much of the handful of conflicting decisions was most effectively disposed of just a few months ago by the highest court of New Jersey, in a decision which, despite appellant's hasty attempt to dismiss it (Statement, p. 9), undoubtedly constitutes the most comprehensive discussion on this subject. In *Fried* v. *Kervick*, 34 N. J. 68, 167 A. 2d 380 (1961), a far more stringent law than ours was upheld—a law actually forbidding the lowering of gasoline prices below the posted prices. The Court there, in pointing out how outdated was the concept that a state could not regulate gasoline prices (let alone

signs) cited this Court's holding in *Nebbia* v. *People of State of New York*, 291 U. S. 502, 537 (1934):

> "• • • with respect to the requirement of due process that a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to effectuate that policy by legislation reasonably adapted to that purpose; also that 'if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise' " (167 A. 2d at 383).

With specific reference to our problem, the Court continued (167 A. 2d at 384):

> "Although the issue has not been raised here, we note that in other states a requirement for posting of signs stating the sale price of gasoline has been upheld. Serve Yourself Gasoline Stations Ass'n v. Brock, 39 Cal. 2d 813, 249 P. 2d 545 (Sup. Ct. 1952), State v. Hobson, 7 Terry 381, 46 Del. 381, 83 A. 2d 846 (Sup. Ct. 1951)(2); State v. Woitha, 227 Iowa 1, 287 N. W. 99, 123 A. L. R. 884 (Sup. Ct. 1939); People v. Arlen Service Stations, supra; Merit Oil Co. v. Director of Division of Necs. of Life, 319 Mass. 301, 65 N. E. 2d 529 (Sup. Jud. Ct. 1946)(3); State v. Guyette, 81 R. I. 281,

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(2) The single provision not held valid by the Delaware court in the above-cited *State* v. *Hobson*, to which appellant seeks to transfer our attetnion (Statement, p. 9), set a maximum of 4 inches by 6 inches on all signs, with no minimum—a limitation so very special as to make plain the inapplicability of all these varying cases to the particular statute and fact pattern in New York.

(3) Appellant's statement (Statement, p. 9) as to *Sun Oil Co.* v. *Director of Division on Necessaries of Life*, 163 N. E. 2d 276 (Mass. 1960), is quite misleading; the signs advertising "thrift" there were held not to be barred by the Massachusetts statute because those very signs gave the full basis for the claim of thrift—the special blending process used, peculiar to that appellant, and of course not claimed by the instant one. The *Merit Oil Co.* decision, properly cited by the New Jersey court as being in accord with the New York rule, remains the law of Massachusetts.

102 A. 2d 446 (Sup. Ct. 1954); Annotation 131 A. L. R. 1266 (1941). The reason for the holding is that the mandate represents a proper legislative effort to control the practice of deception and fraud upon the public with respect to the price charged for gasoline."

• • •

"The New York Court of Appeals in People v. Arlen Service Stations, supra, regarded the price display requirement as a reasonable regulation governing the use of property offered for sale so as to prevent fraud and imposition on the public. Regal Oil Co. v. State, supra [123 N. J. L. 456, 10 A. 2d 495], appears to be to the contrary. * * * [However, *inter alia*, it was] decided without regard to Nebbia v. People of State of New York and Olsen v. State of Nebraska, supra [313 U. S. 236], which we regard as expressive of more appropriate constitutional doctrine."

We submit that appellant's broadside challenge (Brief, p. 8) to "the constitutionality of statutes and ordinances prohibiting the display of gasoline price signs except those of limited size on pumps" merits the same disposition—dismissal for want of a substantial federal question—as was meted out to the appeal in the similar case of *Serve Yourself Gasoline Stations Assoc.* v. *Brock*, 39 Cal. 2d 813, 249 P. 2d 545 (1952), app. dism. 345 U. S. 980 (1953). There the California Legislature had attacked the same problem of misleading gasoline station advertising, not by limiting stations to clearly worded signs on pumps—as New York City and a number of other cities and states have done—but by infinitely detailed prescription as to the content, size of lettering, design and print used on signs—including requirements that numerals be no more than twice the size

of letters, that the height of letters be no more than twice the width, etc. The California court, noting that this was a different approach from that of barring signs big enough to lure passing motorists, ultimately held simply that the legislation was a reasonable means of dealing with the problem. This Court dismissed the resulting appeal "for the want of a substantial federal question." (345 U. S. 980).

The fact that New York City chose a different method of dealing with this problem obviously cannot raise a substantial federal question either, this Court having found that none existed in the California case. Appellant is simply differing with the wisdom of New York's approach. Since that approach is obviously reasonably related to the legislative purpose, the fact that California's approach (enacted 10 years after New York's, and undoubtedly with an eye to the experience with legislation like this all over the country) may be considered by appellant, or by the California court—or even by this Court—to be a wiser approach, is of course totally irrelevant. 6 McQUILLIN, *Municipal Corporations* (3d ed.) Sec. 20.05, p. 12.

We might add that New York City might reasonably have considered its own approach preferable to the California one, if for no other reason, simply because of the possibility that motorists reading large signs might have their attention distracted from the road. Whatever the merits of this view, it was obviously just the kind of question that was of concern to the legislative body, and *not* to this Court.

(c) We turn now to appellant's repeated insinuations (Statement, pp. 3, 5, 7, 12) that New York City's ordinance

was designed to serve "the monopolistic interests of the large gasoline companies" (Statement, p. 7). We challenge appellant to indicate, with appropriate citations, where it finds the slightest support in the record for these statements. For that matter, appellant nowhere explains how its insinuations supplant the settled principle that legislative motive is not open to judicial scrutiny.

Indeed, appellant, part of a corporate complex that owns 17 gasoline stations, 15 terminals, a refinery and ocean-going tankers (Record, 128-9), should be the last to raise this complaint. We call to the Court's attention that the gasoline sold by this syndicate—by its own admission (Record, 123)—came, until 1959, from the same large oil corporations it now attacks. In other words, for at least four years after it started using the name "Save Way" in New York City, it was marketing under that name the gasoline of major oil companies. Appellant is therefore telling this Court that New York's ordinance is invalid because it accords the same treatment to service stations selling nationally advertised brands under their proper names, as it does to stations selling the same brands under other names, artfully designed to incorporate a reference to price saving.

We need hardly point out that all this, apart from its absurdity, goes once again to the wisdom of the legislation and not to its validity. Whether or not better methods of dealing with all of these problems might have been conceived by the New York City legislative body, what it did do was, to say the least, far from arbitrary. In such a situation the courts have no concern. *United States* v.

Carolene Products Co., 304 U. S. 144, 154 (1938); *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 191 (1938); *Hauge* v. *Chicago*, 299 U. S. 387, 392 (1937); *Gant* v. *Oklahoma City*, 289 U. S. 98, 102 (1933).

We note also appellant's sudden discovery (p. 12) that "most of the cases" attacking state regulation of deceptive gasoline station advertising involved "independent dealers whose prices were lower than those of dealers selling nationally advertised brands". First of all, the fact is that most of the cases involve no such thing—it will be observed that no citations accompany this remarkable statement. On the contrary, in at least one case cited by appellant (Statement, p. 8)—*Levy* v. *City of Pontiac*, 331 Mich. 100, 49 N. W. 2d 80 (1951)—the city had argued that the law should be upheld because (49 N. W. 2d at 82) "it *prevents* small gasoline station operators from being squeezed out as a result of monopolistic practices" (Emphasis added).

Beyond all this, we find very interesting appellant's implicit admission, in making this statement, that its price for gasoline is lower than others. Throughout the courts below appellant fought (see, e.g., Record, 50-51, 72, 146-150) every attempt by the City to establish just that fact—since, of course, it would have helped establish the City's contention that "Save Way" was an unworthy contrivance to circumvent the ban on outsize signs advertising price; through the use of this alleged brand name, appellant was enabled, unlike its competitors, to announce its lower price to passing motorists by advising them that here they would find a way to save.

The three New York courts, even without the benefit of knowing that appellant's prices were lower, saw through its violation of the ordinance, and re-affirmed all their prior holdings that the ordinance was a reasonably conceived way of dealing with the danger of deceptive gasoline station advertising. Nothing now raised by appellant indicates the slightest reason for burdening this Court with one more application of the long-settled doctrines as to municipal police power.

Conclusion

It is respectfully submitted that appellant has presented no substantial question for resolution by this Court. The appeal should be dismissed.

November 22, 1961.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

SAVE WAY NORTHERN BLVD. INC.,

Appellant,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

APPELLANT'S REPLY TO MOTION TO DISMISS

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IN THE

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OCTOBER TERM, 1961

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Appellant,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

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APPELLANT'S REPLY TO MOTION TO DISMISS

Appellee's unseemly and unsupported attack upon appellant, charging it with attempting to "outwit and evade", with "deliberate violation", with engaging in a "scheme to circumvent", indicates a brief reply to point up the real issue presented on this appeal.

There is nothing in the record to support the charge that appellant was criminally motivated in choosing the name "Save Way" as its trade and brand name; and for all of its vituperation, appellee does not accuse appellant of failure to post proper signs on pumps (fol. 47) or of having committed any fraudulent practice in violation of §B36-104.0 of the Administrative Code.*

* Section B36-104.0 reads in pertinent part as follows:

"§B36-104.0 FRAUDULENT PRACTICES PROHIBITED.—It shall be unlawful for any person, firm or corporation to sell or offer for sale gasoline or other petroleum products for use in motor vehicles at retail in any manner so as to deceive or tend to deceive the purchaser as to the price, nature, quality or identity thereof, . . . or to substitute, mix or adulterate gasoline or other petroleum products sold or offered for sale under a name, trade name, brand, symbol or mark."

The sole question presented on this appeal is whether New York City, in the guise of regulating the business of selling gasoline, may constitutionally make it a crime punishable by fine and imprisonment for appellant to use its trade and brand name "Save Way".

The question here presented was not disposed of by this Court's dismissal of the appeal in *Serve Yourself Gasoline Stations Ass'n* v. *Brock*, 39 Cal. 2d 813, 249 P. 2d 545 (1952) app. dism. 345 U.S. 980 (1953), as suggested by Appellee (brief p. 14). The California statute does not prohibit display of the word "save" on signs of sufficient size to be visible from the road. It merely requires that the actual price of gasoline be stated in numbers of equal size—a requirement which would clearly violate the New York City Ordinance.*

The Supreme Court of California, in upholding the constitutionality of its statute, expressly pointed to the fact that no one is prevented from displaying words such as "save". Recognizing that "the right to advertise is a property right * * * ," the Court said:

> "* * * the legislation under consideration here differs substantially from that involved in the above cases (citing *People* v. *Arlen Service Stations, Inc.* among others). There the right to maintain signs of a sufficient size to be read by a passing motorist was prohibited. Our statutes do not prohibit effective advertising in this sense. Rather, sections 20882 and 20883 of the Business and Professional Code en-

* Appellee's overzealousness may be illustrated by its baseless assertion (brief, page 17) that appellant has sought to withhold from the courts below the price at which it sells its gasoline. Aside from the fact that the burden of proof was upon the prosecution which made no inquiry on the subject, the folio references cited in support of said assertion support the charge not at all (see cited Record folios 50-51, 72, 146-150).

> courage the same by establishing minimum requirements as to size of lettering on the signs, thereby making more certain that the passing motorist can read them. The difference is of significance. *The ultimate right to advertise price is unaffected by our statutes* * * *" (Emphasis supplied.)

Our brief in the Special Sessions Court is quoted at length in an effort to show that we argued below that the ordinance was intended to avoid fraud in posting prices on signs, as if appellant's argument that the ordinance was not intended to prevent the use of its trade name is inconsistent with the position taken on this appeal that the ordinance, as interpreted below, violates appellant's constitutional rights.

It may be, as we urged below, that appellant's conviction goes much too far in expanding the ordinance's applicability, but this Court takes the statute as it finds it, including its interpretation by the highest Court of the State (see, e.g., *Smith* v. *California,* 361 U.S. 147 (1959)).

So interpreted, the appellee must argue that the city's right to regulate the gasoline business justifies its proscribing the use of any words which would suggest that a particular gasoline dealer offers savings, thrift or economy in the purchase of gasoline or a better price than his competitor's.

Under the ordinance as interpreted, the words "thrift", "bargain", "discount", "savings", "economy", "sale", common words used in our competitive system are forbidden and the use of any of them in advertising on signs constitutes a crime punishable by fine and imprisonment.*

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* §B36-105.0 VIOLATIONS. Violation of any of the provisions of this article shall, upon conviction therefor, be punished by a fine of not more than two hundred fifty dollars or by imprisonment for not more than sixty days, or by both such fine and imprisonment.

Clearly, there is no relationship between so sweeping a prohibition—vitally affecting the business of appellant and other independent dealers—and the avowed purpose of the ordinance to prevent fraud in the retail sale of gasoline.

As was recently stated by Mr. Justice Douglas in his dissent in *Martin* v. *Walton*:

> "States have great leeway in making classifications, in providing general rules, in differentiating evils by broad lines or by narrow ones. Where, however, a State declares what purpose the law has, no room is left to conceive of any other purpose it may serve. See *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U.S. 522, 530. A law, fair on its face, may be applied in a way that violates the Equal Protection Clause of the Fourteenth Amendment. *Yick Wo* v. *Hopkins*, 118 U.S. 356, 373-374. Here the law as applied has no relation whatsoever to the declared evil at which the law was aimed. It is, therefore, invidious in its application, striking without reason at a citizen's activities which touch several States, as constitutionally they are entitled to do under our federal regime. *Cf. Edwards* v. *California*, 314 U.S. 160" (30 U.S. Law Week 4002, 4003, decided Nov. 6, 1961).

While the City of New York concededly has the power to regulate the sale of gasoline so as to prevent fraud, there is none the less a substantial question here presented respecting the constitutional limits in the exercise of that power. This question is of public importance and deserves resolution by this Court.

Respectfully submitted,

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